IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

ASSOCIATED TELEPHONE AND TELEGRAPH COMPANY, AUTOMATIC ELECTRIC COMPANY

and

AUTOMATIC ELECTRIC LABORATORIES, INC.,
Petitioners,

vs.

FEDERAL TELEPHONE AND RADIO CORPORATION,
Respondent.

PETITIONERS' RESPONSE TO RESPONDENT'S REPLY BRIEF.

The Order Sought To Be Reviewed While Interlocutory Is Jurisdictional.

Respondent seeks to avoid a review of the vital jurisdictional issue on the ground that a ruling on a motion to dismiss is interlocutory in character. But every jurisdictional challenge, when jurisdiction is absent, is interlocutory. Any ruling confining the federal judicial power to its statutory ambit is reviewable in the interlocutory stage, and this Court has so held. *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269; and *Kloeb* v. *Armour & Co.*, 311 U. S. 199.

Automatic's Alleged "Reluctance."

Automatic has no reluctance to join issue with Respondent; but here there is no "definite and concrete" issue, such as this Court requires, because of Respondent's mysterious unwillingness to plead any *facts* which establish "an actual controversy" or any *facts* showing the manufacture or sale, actual or proposed, of specific apparatus. Automatic, purely and simply, is in the dark on what Respondent is making or offering for sale in the United States. (*See undenied affidavits,* R. 10a; 15a.)

The Insufficient Complaint.

Respondent complains that Petitioners have not denied the allegations of Paragraphs 5 and 7 of the complaint. It would have been improper to do so in a motion to dismiss. But, even more important, the complaint's references to unidentifiable "telephone apparatus and systems" are too ethereal to call for a denial. In short, Paragraphs 5 and 7 of the complaint (quoted in full at page 4 of the petition) are grossly inadequate.

The District Court pointed out that a pleader's *conclusions* cannot establish an actual controversy (R. 25a).

Automatic expressly denied the court's jurisdiction (R. 6a).

Obviously, Respondent wants a District Court to pass upon the validity of Automatic's patents without relation to any specific apparatus, and thus substitute for the indispensable "actual controversy" an undefined investigative inquiry.

The Rochester Order.

Respondent says that our denial of knowledge of its apparatus "cannot be reconciled with Petitioners' admission

that they were competitive bidders for at least one of Respondent's orders." (P. 4) Respondent reached low for this one; it well knows that in this industry competitive bidders cannot acquire any information which would identify in detail the equipment which the other bidder proposes to furnish. Automatic's uncontroverted affidavit explains this at length (R. 18a).

The Advertisements.

The ads—on which Respondent bottoms its entire case—contained no challenge to Respondent's undisclosed plans. Closing with a respectful reference "to the rights of • • • other manufacturers under the patent laws," the ads did no more than announce the end of our wartime free licensing policy and urge prospective purchasers of telephone equipment to make the customary investigation of possible patent liability and thereby avoid the innocent acquisition of equipment like that built under the terminated wartime licenses. Neither Respondent nor its customers were named, nor any reference made to Respondent's equipment.

Conclusion.

Respondent agrees with us that this case lacks precedent in fact (P. 5). The consequences of affirmance also lack precedent, for the District Courts are, by the doctrine of this decision, thrown open to countless inquiries framed in the generalities of this complaint, precipitated by no more than a commercial notice published in good faith by a manufacturer with no record of seeking to use its patent position improperly.

The alternative is to respect the restrictive terms of the Declaratory Judgment Act and the constitutional limitations within which it is framed. *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 240.

Respondent need only make up its mind as to what apparatus it plans to manufacture, identify it, and then determine, in accordance with custom, which patents (if any) may be infringed. The task is a reasonable one, incomparable with the burden upon the courts which affirmance would impose.

The petition should be granted.

Respectfully submitted,

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October 5, 1948.